

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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## TERESA RENITA BURWELL,

Plaintiff,

V.

LAS VEGAS METROPOLITAN POLICE  
DEPARTMENT et al.,

### Defendants.

Case No.: 2:21-cv-01901-RFB-EJY

## ORDER and AND RECOMMENDATION

This matter comes before the Court on Plaintiff's application to proceed *in forma pauperis* and Complaint. ECF Nos. 1 and 1-1.

## I. *IN FORMA PAUPERIS* APPLICATION

On October 14, 2021, Plaintiff, a non-inmate individual, filed an application to proceed *in forma pauperis*. The application is complete and Plaintiff will be allowed to proceed *in forma pauperis*.

## **II. SCREENING THE COMPLAINT**

Upon granting a request to proceed *in forma pauperis*, a court must screen the complaint under 28 U.S.C. § 1915(e)(2). In screening the complaint, a court must identify cognizable claims and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may be granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court liberally construes *pro se* complaints and may only dismiss them “if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014) (quoting *id.*)

1           A.     Plaintiff's Complaint.

2           Plaintiff's Complaint alleges ADA and First Amendment claims in connection with the  
 3 events of August 7 and 8, 2021. ECF No. 1-1 at 4. On that date, Plaintiff says two police officers  
 4 came to her house after she called 911 reporting a domestic dispute with her son. *Id.* Plaintiff  
 5 contends she was arrested after she threatened to buy a gun and shoot her son in front of the officers.  
 6 *Id.* at 8. Plaintiff does not dispute that she made the threat, but argues that she was wrongfully  
 7 arrested in violation of her First Amendment rights. As a result of the arrest, Plaintiff was  
 8 incarcerated for 30 hours in Clark County Detention Center ("CCDC"). *Id.* at 5.

9           Plaintiff claims that she "wasn't given proper accommodations for [her] physical disability"  
 10 while in CCDC despite putting the facility on notice of various injuries, including a recent spinal  
 11 surgery to address multi-level disc compromise. *Id.* at 9-10. Plaintiff states she was booked, "triaged  
 12 by medical," placed in the medical holding cell, after which she was not administered her "pain  
 13 management" medication, which she needed due to the surgery. *Id.* Plaintiff complains that she has  
 14 "a restriction for sitting and standing" and that "the strain of sitting and laying on hard concrete"  
 15 exacerbated her injuries. *Id.* Plaintiff alleges that the experience caused her recovery to regress and  
 16 exacerbated her spinal pain. *Id.* at 11. Plaintiff also alleges emotional trauma arising from spending  
 17 time in jail. *Id.* Plaintiff asks for \$300,000 in actual and punitive damages.

18           B.     Plaintiff fails to state a claim for retaliatory arrest under the First Amendment.

19           In considering whether the complaint is sufficient to state a claim, all allegations of material  
 20 fact are taken as true and construed in the light most favorable to the plaintiff. *Wyler Summit P'ship*  
 21 v. *Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Although the  
 22 standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must allege  
 23 more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
 24 A formulaic recitation of the elements of a cause of action is insufficient. *Id.* Unless it is clear the  
 25 complaint's deficiencies cannot be cured through amendment, a *pro se* plaintiff should be given  
 26 leave to amend the complaint with notice regarding the complaint's deficiencies. *Cato v. United*  
 27 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

1           A claim for retaliatory arrest under the first amendment fails as a matter of law where police  
 2 had probable cause for the arrest. *Nieves v. Bartlett*, 587 U.S. \_\_; 139 S.Ct. 1715 (2019); *Capp v.*  
 3 *Cty. of San Diego*, 940 F.3d 1046, 1056 (9th Cir. 2019). “Plaintiffs bringing ‘First Amendment  
 4 retaliatory arrest claims’ must generally ‘plead and prove the absence of probable cause.’” *Capp*,  
 5 940 F.3d at 1056, quoting *Nieves*, 139 S.Ct. at 1723. In her Complaint, Plaintiff states that she yelled  
 6 in front of an officer “that if [her son] came back, [she] was going to by [sic] a gun and shoot him.”  
 7 ECF No 1-1 at 8. The officer then told her the threat constituted a misdemeanor offense and arrested  
 8 her. *Id.* NRS 200.571(1)(a)(1) creates a misdemeanor offense where a person knowingly threatens  
 9 to “cause bodily injury in the future to the person threatened or to any other person” without lawful  
 10 authority.

11           Importantly, Plaintiff does not dispute that she made the threat, but rather states that she was  
 12 upset and that she “meant to say if he comes back fighting me.” *Id.* However, Plaintiff does not  
 13 plead the absence of probable cause with respect to her arrest. Rather, Plaintiff admits to threatening  
 14 her son with bodily injury in front of the officer and gives no reason to believe the threat was not a  
 15 knowing true threat made without lawful authority. Examining the face of Plaintiff’s Complaint,  
 16 the officer had probable cause to arrest Plaintiff for a violation of NRS 200.57(1)(a)(1) when Plaintiff  
 17 threatened to shoot and kill her son. Because Plaintiff did not plead the absence of probable cause  
 18 for the arrest, Plaintiff’s First Amendment retaliatory arrest claim fails as a matter of law. The Court  
 19 therefore recommends dismissal of this claim without prejudice and with leave to amend.

20           C.     Plaintiff fails to state a claim under the ADA.

21           i.       *The ADA does not permit Plaintiff to sue individuals for money damages.*

22           Title II of the ADA applies to prisons and incarcerated persons. *Pennsylvania Dept. of*  
 23 *Corrections v. Yeskey*, 524 U.S. 206 (1998). However, a plaintiff cannot vindicate rights created by  
 24 Title II of the ADA by asserting claims against defendants in their individual capacities under 42  
 25 U.S.C. § 1983. *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002). Instead, the proper  
 26 defendant in a Title II claim is the public entity responsible for the alleged discrimination. *United*  
 27 *States v. Georgia*, 546 U.S. 151, 153-54 (2006). To the extent Plaintiff names any individual  
 28 defendants in her Title II ADA claim, these defendants must be dismissed with prejudice.

1                   *ii. Plaintiff cannot sue CCDC.*

2                   CCDC is a building, not an “entity capable of suing or being sued.” *Yates v. NaphCare*, Case  
 3 No. 2:12-cv-01865-JCM, 2013 WL 4519349, at \*3 (D. Nev. Aug. 23, 2013) (dismissing plaintiff’s  
 4 complaint against Clark County Detention Center). The Court therefore recommends dismissal of  
 5 Clark County Detention Center from this action with prejudice.

6                   *iii. Plaintiff fails to allege facts supporting a violation of the ADA.*

7                   Even assuming a proper defendant, Plaintiff’s Complaint does not contain facts establishing  
 8 an ADA violation. Title II of the ADA states: “no qualified individual with a disability shall, by  
 9 reason of such disability, be excluded from participation in or be denied the benefits of the services,  
 10 programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42  
 11 U.S.C. § 12132; 28 C.F.R. § 35.130(a). Disability means: “(A) a physical or mental impairment that  
 12 substantially limits one or more major life activities of such individual; (B) a record of such  
 13 impairment; or (C) being regarded as having such an impairment[.]” 42 U.S.C. § 12102(1); *see also*  
 14 *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 794 (9th Cir. 2001).

15                  A “qualified individual with a disability” is “an individual with a disability who, with or  
 16 without reasonable modifications to rules, policies or practices, the removal of architectural,  
 17 communication, or transportation barriers, or the provision of auxiliary aids and services, meets the  
 18 essential eligibility requirements for the receipt of services or the participation in programs or  
 19 activities provided by a public entity.” 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104. Discrimination  
 20 under Title II of the ADA includes a public entity’s failure to “make reasonable modifications in  
 21 policies, practices, or procedures when the modifications are necessary to avoid discrimination on  
 22 the basis of disability, unless the public entity can demonstrate that making the modifications would  
 23 fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7).

24                  A claim under Title II of the ADA thus requires a plaintiff to plead (1) she is an individual  
 25 with a disability, (2) she is otherwise qualified to participate in or receive the benefit of some public  
 26 entity’s services, programs, or activities, (3) she was either excluded from participation in or denied  
 27 the benefits of the public entity’s services, programs, or activities, or was otherwise discriminated  
 28 against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by

1 reason of [his] disability. *O'Guinn v. Lovelock Correctional Center*, 502 F.3d 1056, 1060 (9th Cir.  
2 2007) (internal quotation marks and citation omitted, alterations in original).

3 Plaintiff does not identify a service, program, or other available benefit from which she was  
4 excluded on the basis of disability. Further, Plaintiff received medical attention and specialized  
5 treatment upon arrival at the jail. ECF No. 1-1 at 9. “When [a] plaintiff has alerted the public entity  
6 to his need for accommodation,” the public entity has a ‘well settled’ duty to ‘undertake a fact-  
7 specific investigation to determine what constitutes a reasonable accommodation.’ This duty  
8 requires the public entity ‘to gather sufficient information from the [disabled individual] and  
9 qualified experts as needed to determine what accommodations are necessary.’” *Munoz v.*  
10 *California Dep’t of Corr. & Rehab.*, 842 F. App’x 59, 62 (9th Cir. 2021), quoting *Duvall v. Cnty. of*  
11 *Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001). The doctors at CCDC evaluated Plaintiff and  
12 determined that the appropriate reasonable accommodation was to place her in the medical cell. ECF  
13 No. 1-1 at 9. Plaintiff does not provide factual information suggesting further accommodation was  
14 warranted. Therefore, the Court defers to the assessment of the medical experts at the facility and  
15 recommends dismissal of the ADA claim without prejudice.

### 16 III. ORDER

17 IT IS HEREBY ORDERED that Plaintiff’s application to proceed *in forma pauperis* (ECF  
18 No. 1) is GRANTED.

### 19 IV. RECOMMENDATION

20 IT IS HEREBY RECOMMENDED that Plaintiff’s complaint is DISMISSED without  
21 prejudice with leave to amend. Plaintiff shall have until **March 14, 2022** to file an amended  
22 complaint correcting the deficiencies identified above. If Plaintiff chooses to file an amended  
23 complaint, she shall write the word “Amended” above the words “Civil Rights Complaint” in the  
24 caption. Plaintiff is advised that if she files an amended complaint, that complaint must include all  
25 of the facts and all claims for relief Plaintiff seeks to assert because, upon filing an amended  
26 complaint, Plaintiff’s original complaint no longer plays any role in this case.

1 IT IS FURTHER RECOMMENDED that if Plaintiff fails to file an amended complaint by  
2 or before **March 14, 2022**, the Court will recommend this matter be dismissed without prejudice.  
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4 DATED THIS 14 day of February, 2022.

5   
6 ELAYNA J. YOUCAH  
7 UNITED STATES MAGISTRATE JUDGE  
8

9 **NOTICE**

10 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be  
11 in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has  
12 held that the courts of appeal may determine that an appeal has been waived due to the failure to file  
13 objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also  
14 held that (1) failure to file objections within the specified time and (2) failure to properly address  
15 and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal  
16 factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir.  
17 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

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